Opinion

Pushing ahead with judicial reform

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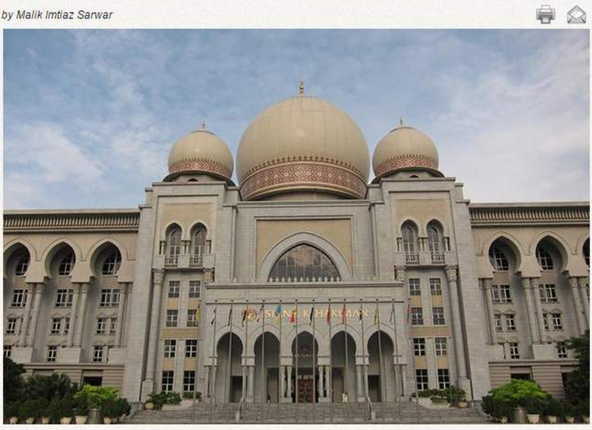

THERE is a growing perception that judicial reform may finally be gaining traction.

Efficiency in court has increased tremendously with the Kuala Lumpur High Court and the appellate courts disposing of cases at a commendable rate. It is now not unusual for cases to be disposed of by the High Court within nine months from the date of commencement, a far cry from the not-so-distant days when cases took up to five or six years to be determined.

This has not only been about managing the situation or cracking the proverbial whip, it has equally been about embracing a new mindset and the technology that makes it a reality. And while questions are still being asked about the quality of justice — after all, justice sped up will at times result in justice denied — I believe the merits of the changes we are experiencing outweigh their demerits.

Having said that, this is a serious concern that must be addressed by the Judiciary, a matter I will return to.

On other fronts, eyebrows have been raised by several decisions over the past year or so that suggest an increasingly independent judiciary. Among them was the majority decision of the Court of Appeal striking down as unconstitutional section 15(5)(a) of the University and Universities Colleges Act last October.

A short while later, the High Court acquitted Datuk Seri Anwar Ibrahim of sodomy charges. In July, the High Court quashed the Home Minister's declaration of Bersih 2.0 as an illegal organisation, while more recently in October, the High Court quashed the decision of the Home Minister rejecting Mkini Dotcom's (the owners of Malaysiakini) application for a permit to publish a newspaper.

These decisions and others like them are important not just for what they concluded but equally for what they signify to Malaysians: that the judges of the Malaysian courts are free to determine the issues before them as they see fit and without regard to any concerns, on their part, as to their prospects within the institution.

With no intention of undermining the respect these decisions deserve, I believe that the judges felt free to do what it is they thought best principally because the chief justice has made it sufficiently clear to his judges that that is exactly what it is they are required to do.

If there is one thing that marks the Arifin Court, it is that the chief justice has, at least publicly, consistently expressed his belief in the need for an independent judiciary. While this may seem a truism to many of us, the sentiment is nuanced when we take into account the make-up of the judiciary.

Consider this. The Judicial Appointments Commission was established in 2009 in part due to outcry over the controversial video recording of lawyer V K Lingam that resulted in the establishment of a Royal Commission of Enquiry, which in turn made evident serious weaknesses in the way judges were appointed.

These events led to an admission by the then prime minister, Tun Abdullah Badawi, that the appointment process was such that the best persons for the job were not necessarily selected. The self-evident implications of this admission were, and still are, a matter of grave concern.

It also cannot be ignored that in the period following the judicial crisis of 1988, the number of judges who were appointed from the Bar dwindled to the point of being negligible. In the period after, the overwhelming majority of judges were appointed from the Attorney General's Chambers — elevations being perceived by some as "promotions".

Many had not directly experienced the traditions of the Bar or were given an opportunity to fully appreciate the distinct relationship between Bar and Bench. This limited exposure had perhaps, in some cases, resulted in a blurring of the defining lines of judicial office and a tendency to respond to authority in a manner not entirely consistent with that august office. This may explain how it is things got to that point where the government felt a need to introduce reforms.

And although I have no foundation for this, I would venture that the judiciary has not been left unscathed by the vagaries of race and religious politics, and the executive has over the years become accustomed to dominating the organs of the state without due regard to the separation of powers.

These are just some of the more important dimensions of the discussion at hand. They, however, shed some light into the complexity of instilling a sense of independence into an ailing institution. Like all institutions, however, strong leadership and leadership by example will go a long way. And I believe that the chief justice is striking the right notes.

This is not to say that more cannot be done. The chief ought give consideration to concerns that the speedy disposal of cases by judges, in particular the Court of Appeal, has resulted in case loads that impair the ability of judges to do justice. In an effort to finish their lists of cases, some judges have tended to unreasonably restrict the time given to counsel to present their cases.

In some cases, it is not apparent that written submissions had been properly digested by the presiding judges, a situation that might be explained by the fact that the case load, as punishing as it is, left them with little or no time to do the same. In fairness, this may have been a result of submissions coming in late — the relentless schedule has had its toll on advocates as well.

The chief must also consider if the quality of judgments being handed down leaves anything to be desired. This is not a matter for appeals, which are more properly utilised to address complex points of law. There is a growing concern at the Bar that the quality of judgments is declining.

If this is the case, and perhaps the chief should consider conducting an audit, then urgent steps must be taken to address this, perhaps by appropriate judicial training. This can also be addressed by requiring all judges, even those of the Court of Appeal, to write judgments on each of their cases. It is admittedly a time-consuming process, but one with obvious benefits.

And above all, the chief must keep his ear to the ground. If he listens, he will hear what it is that is being said about his judges. For as much as lawyers may whinge, at the end of the day, their lives are intertwined with those of the judges. The Bench and the Bar balance and keep each other afloat in the stormy seas of state.

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